

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the matter of	)	
	)	
Re-examination of the Comparative Standards	)	
for Noncommercial Educational Applicant	)	<b>MM Docket No. 95-31</b>
	)	
Association of America's Public Television	)	
Stations' Motion for Stay of Low Power	)	
Television Auction (No. 81)	)	

To: The Commission

**COMMENTS OF KALEIDOSCOPE FOUNDATION, INC.**

1. Kaleidoscope Foundation, Inc. ("KFI") hereby submits its comments in response to the *Second Further Notice of Proposed Rulemaking* in MM Docket No. 95-31, in which the Commission seeks an approach to resolve mutually exclusive broadcast applications involving both commercial and noncommercial educational ("NCE") entities. This proceeding results from *National Public Radio v. FCC*, 254 F. 3d (D.C. Cir. 2001), where the Court held that competitive bidding may not be used for noncommercial applications, even when they are mutually exclusive with commercial applications that by statute are subject to the bidding process.

2. KFI is a nonprofit educational organization, which has in the past tendered applications for construction permits to operate noncommercial educational stations on nonreserved allotments. Some of these applications remain pending and are mutually exclusive with applications filed by commercial entities. Thus KFI is directly affected by the outcome of this proceeding.

3. Because of the heavy demand and decreasing amount of television spectrum available, particularly in light of the reallocation of Channels 52-69, KFI submits that the Commission should not bar noncommercial entities from applying for non-reserved channels.

Instead, the Commission should establish a procedure that maximizes access to available television spectrum and should adopt the second option in the *NPRM*, whereby commercial allotments will remain open to both NCE and commercial entities.

4. If an NCE applicant applies for a non-reserved allotment, and there is no mutually exclusive commercial applicant, a construction permit should be awarded to a noncommercial applicant either on a singleton basis or based on the established noncommercial point system.

5. If both noncommercial and commercial applicants seek the same channel, the Commission should not adopt its proposal to dismiss the NCE applicants but rather should declare that the channel will be authorized only for commercial use, and all applicants must either amend to propose commercial operation and participate in competitive bidding or else withdraw or face dismissal as an ineligible applicant.

6. It would not be futile to allow noncommercial applicants to convert to commercial status. While some nonprofit entities would withdraw, others might elect to operate a commercial business and to pay taxes<sup>1</sup> on the activities of the station. Still others might form a for-profit subsidiary or otherwise undertake a *pro forma* amendment to their structure so as to permit for-profit activity. Moreover, there is nothing to prevent a nonprofit entity from participating in competitive bidding, paying for and receiving a commercial construction permit, and then electing to operate the station noncommercially.<sup>2</sup> These are internal decisions for each applicant to make based on its own circumstances. In any case, there is no reason to deprive all noncommercial entities of the fruits of their time and expense in

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<sup>1</sup> Unless barred by their organizational documents, noncommercial entities may normally engage in for-profit activities and pay unrelated business income taxes.

<sup>2</sup> An unreserved channel may be used commercially or noncommercially, as the licensee sees fit. See *TV Table of Allotments (Buffalo, NY)*, 14 FCC Rcd. 11856 at fn. 5 (MM Bur. 1999), citing the *Memorandum Opinion and Order in Docket 8736*, 8 RR 469-470 (1952).

developing applications. If they are able to find a way to compete for a commercial license, they should be permitted to do so if they so desire and if they are willing to comply with commercial application and bidding requirements.

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April 15, 2002

Respectfully submitted,

/s/ Jason Roberts  
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